

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

LINCOLN LUTHERAN OF RACINE,)	
)	
<i>Employer,</i>)	
)	
and)	Case No. 30-CA-111099
)	
SERVICE EMPLOYEES INTERNATIONAL)	
UNION HEALTHCARE WISCONSIN,)	
SEIU-HCWI,)	
)	
<i>Union.</i>)	

**MOTION OF NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC.
TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF
LINCOLN LUTHERAN OF RACINE**

The National Right to Work Legal Defense Foundation, Inc. respectfully requests leave to file a brief amicus curiae in support of Lincoln Lutheran of Racine in the above-captioned case. The Foundation is a nonprofit, charitable organization that provides free legal assistance to individual employees who, as a consequence of compulsory unionism, suffered violation of their civil rights. These include their right to work; their freedoms of association, speech, and religion; their rights to due process of law; and other fundamental liberties and rights guaranteed by the United States Constitution and laws of the United States and of the several states.

This case presents the question of whether 50 years of caselaw precedent should be overturned to now mandate that an employer's obligation to deduct union dues pursuant to a dues-checkoff agreement continues beyond the expiration of the collective bargaining agreement enabling it.

Dated: October 10, 2014

Respectfully submitted,

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Brief of *Amicus Curiae*
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INTEREST OF AMICUS CURIAE

The National Right to Work Legal Defense Foundation, Inc. files this brief as *amicus curiae*. The Foundation is a nonprofit, charitable organization that provides free legal assistance to individual employees who, as a consequence of compulsory unionism, suffer violation of their civil rights. These include their right to work; their freedoms of association, speech, and religion; their right to due process of law; and other fundamental liberties and rights guaranteed by the United States Constitution and laws of the United States and of the several states. Foundation attorneys often represent employees who wish to see their dues deductions cease without having to navigate the uncertain shoals of the arcane and convoluted restrictions often placed on revocation of dues deduction authorizations. *See, e.g., Washington Gas Light Co.*, 302 NLRB 425, 425 n.1 (1991).

ARGUMENT

For half a century, beginning in 1962 with *Bethlehem Steel Co.*, the National Labor Relations Board has held that an employer's obligation to deduct union dues pursuant to a dues check-off agreement terminates upon the expiration of the collective bargaining agreement enabling it.¹ That same year, the U.S. Supreme Court held in *NLRB v. Katz* that the National Labor Relations Act² prohibits employers from unilaterally changing mandatory bargaining subjects that are under negotiation with a union.³ However, the Supreme Court subsequently recognized in *Litton Financial Printing Division* that there are statutory reasons why "some

¹ *Bethlehem Steel*, 136 NLRB 1500 (1962); *see, e.g., Litton Fin. Printing Div., a Div. of Litton Bus. Sys., Inc. v. N.L.R.B.*, 501 U.S. 190, 199 (1991); *Tampa Sheet Metal Company*, 288 NLRB 322, 326 n.15 (1988).

² 29 U.S.C. §§151 et seq.

³ *NLRB v. Katz*, 369 U.S. 736, 742-43 (1962).

terms and conditions of employment...do not survive expiration of an agreement.”⁴ And, the Court there acknowledged “the Board’s view that union security and dues check-off provisions are excluded from the unilateral change doctrine because of statutory provisions which permit these obligations only when specified by the express terms of a collective-bargaining agreement.”⁵

Through nine presidential administrations, twenty NLRB General Counsels, and forty-seven NLRB Members, the Board upheld the dues-checkoff exception to *Katz*. However, in 2012, an invalidly constituted Board⁶ abandoned the *Bethlehem Steel* rule in *WKYC-TV, Inc.*, finding for the first time that a dues check-off contract obligation survives the expiration of the collective agreement.⁷ The question presented in this case is whether this Board should adopt the rationale of *WKYC-TV* and overrule *Bethlehem Steel*.

Service Employees International Union Healthcare Wisconsin fails to provide a compelling argument to adopt *WKYC-TV, Inc.*’s rationale to overturn *Bethlehem Steel*. The *Bethlehem Steel* decision and subsequent caselaw are long-standing precedent, grounded in the freedom of contract that the Act protects. *See H. K. Porter Co. v. NLRB*, 397 U.S. 99, 102 (1970) (“while the Board does have power under the National Labor Relations Act . . . to require employers and employees to negotiate, it is without power to compel a company or a union to agree to any substantive contractual provision of a collective-bargaining agreement.”). *Bethlehem Steel* affirmed the uncontroverted understanding that parties must be free to negotiate

⁴ *Litton Fin. Printing Div., supra*, at 199. In *Litton*, the Court held that, because “under the NLRA arbitration is a matter of consent,” a mandatory arbitration clause expires with the expiration of a contract. *Id.* at 199-201.

⁵ *Id.* at 199 (citing 29 U.S.C. § 158(a)(3) as to “union security” and 29 U.S.C. § 186(c)(4) as to check-off).

⁶ *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014).

⁷ 359 NLRB No. 30 (2012) (3-1 decision).

their own collective bargaining agreements and limit their terms and durations. Whether in a forced dues state or a Right to Work state, dues check-off is an employer provided service for the convenience of a union and participating, represented employees during the term of a negotiated collective agreement only. When the collective bargaining agreement expires, there is no reason to require an employer to continue to serve as the union's collection agent.

A. Dues Check-Off and Union Security Differ from Other Employment Terms Because They Exist Only Because of a Collective Bargaining Agreement.

Bethlehem Steel found so-called “union security,” dues check-off, preferential seniority, and grievance procedures to be mandatory bargaining subjects because they relate to “wages, hours, and other terms and conditions of employment” as set forth in Section 8(d) of the Act.⁸ But the Board noted differences between dues check-off and “union security” from other mandatory subjects:

The check-off provisions in [the Employer's] contracts with the Union implemented the union-security provisions. The Union's right to such checkoffs in its favor, like its right to the imposition of union security, was created by the contracts and became a contractual right which continued to exist so long as the contracts remained in force. ...Consequently, *when the contracts terminated, the [Employer] was free of its checkoff obligations to the Union.*⁹

Criticism of the Board's 1962 *Bethlehem Steel* decision only began 38 years later with the dissent in *Hacienda Resort Hotel & Casino [Hacienda I]*.¹⁰ The dissent argued that, while Section 8(a)(3) of the Act¹¹ makes clear that a compulsory unionism clause terminates upon contract expiration, the statutory provision governing dues check-off agreements, 29 U.S.C. §

⁸ 29 U.S.C. § 158(d); *see* 136 NLRB at 1502.

⁹ 136 NLRB at 1502 (emphasis added).

¹⁰ 331 NLRB 665, 667 (2000) (3-2 decision).

¹¹ 29 U.S.C. § 158(a)(3).

186(c)(4), does not require the same.¹² Thus, the dissent submitted that *Bethlehem Steel* and its progeny inappropriately conflated dues check-off with “union security.”¹³

The *Hacienda I* dissent missed the crux of *Bethlehem Steel*, which is not that dues check-off and “union security” are inextricably intertwined. Rather, the focus of *Bethlehem Steel* was that dues check-off and “union security” clauses become conditions of employment *only* through a collective bargaining agreement.¹⁴ Thus, they are unlike wages, benefits, working hours, and other conditions of employment, which exist irrespective of whether a collective bargaining agreement is in place. For example, employers pay wages to employees, regardless of whether there is a collective bargaining agreement in place. By contrast, employers only collect dues for unions if and when they agree to collect dues for unions. Dues check-off is purely a creature of contract. *Bethlehem Steel* is predicated on this distinction—*i.e.*, that “[t]he Union’s right to such checkoffs in its favor, like its right to the imposition of union security, *was created by the contracts* and became a contractual right which continued to exist so long as the contracts remained in force.”¹⁵

Two Board members recently reiterated this in *Hacienda III*, finding that dues check-off and the other *Katz* exceptions “are uniquely of a contractual nature,” unlike those direct terms and conditions of employment that survive contract expiration.¹⁶ Terms and conditions that survive contract expiration under the *Katz* rule – wages, pension and welfare benefits, hours, working conditions, and numerous other mandatory bargaining subjects – exist prior to the

¹² 331 NLRB at 668-70 (citing 29 U.S.C. § 186(c)(4)).

¹³ *Id.* at 668-69.

¹⁴ *Litton Fin. Printing Div., supra* at 199; *Southwestern Steel & Supply v. NLRB*, 806 F.2d 1111 (D.C. Cir. 1986).

¹⁵ 136 NLRB at 1502 (emphasis added).

¹⁶ *Hacienda Resort & Casino (Hacienda III)*, 355 NLRB 742, 745 (2010) (2-2 decision).

commencement of a bargaining relationship and do not arise with or depend on a contract.¹⁷ In contrast, the obligations to check off dues, refrain from strikes and lockouts, and submit/entertain grievances in arbitration cannot exist absent a contract arising from a bargaining relationship.¹⁸

The Board's *WKYC-TV* decision wrongly ignores this fundamental distinction between dues check-off clauses and other terms of employment. *WKYC-TV* thus does not provide a compelling rationale for the Board to risk its credibility by jettisoning 50 years of established precedent to overrule *Bethlehem Steel* and similar cases.

B. Permitting an Employer to Not Collect Dues for a Union Absent a Contract Protects the Act's Fundamental Principle of Voluntary Unionism

The right of employees under § 7 of the Act to choose freely whether to join or support a union,¹⁹ or to not join or support a union, is the paramount interest protected by the NLRA.²⁰ Requiring that employers continue to extract union dues from employees when there is no contract, and potentially when the union is on strike, is inconsistent with this principle of voluntary unionism.

This is particularly true in non-Right to Work states, where employees often join unions and sign dues check-off agreements only because they are forced to pay union fees as a condition of their employment. As Member Hayes correctly noted in dissent in *WKYC-TV*:

The *Bethlehem Steel* holding is consistent with the Board's longstanding, commonsense recognition that a union security clause operates as a powerful inducement for employees to authorize dues checkoff, and that it is unreasonable to think that employees generally

¹⁷ *Id.*; see *McClatchy Newspapers, Inc. v. NLRB*, 131 F.3d 1026, 1030 (D.C. Cir. 1997); *U.S. Can Co. v. NLRB*, 984 F.2d 864, 869-70 (7th Cir. 1993).

¹⁸ *Id.*

¹⁹ 29 U.S.C. § 157.

²⁰ See, e.g., *Pattern Makers League v. NLRB*, 473 U.S. 95, 104-07, 114 (1985) (paramount policy of NLRA is "voluntary unionism"); *Lee Lumber & Bldg. Material Corp. v. NLRB*, 117 F.3d 1454, 1463 (D.C. Cir. 1997) (Sentelle, J., concurring) (employee free choice is "core principle of the Act").

would wish to continue having dues deducted from their pay once their employment no longer depends on it.²¹

It violates commonsense to think that employees who signed a dues deduction authorization only because of a forced unionism clause would want their employer to continue taking their money, and handing it over to union officials, when they are not forced to pay to keep their jobs.²² Forcing these employees to continue paying monies to a union pursuant to a dues check-off clause, when there is no valid compulsory unionism clause in place, is inconsistent with the principles of employee free choice that the NLRA is supposed to protect.

Moreover, as Member Hayes also recognized, employees' Section 7 right to refrain is not adequately protected by the possibility that they may revoke their check-off authorizations once a contract expires.²³ As he explained,

It is unlikely that employees will recall the revocation language in their authorizations, and less likely still that they will understand that their obligation to pay dues as a condition of employment terminated as a matter of law once the contract expired. Even if they do remember and understand, checkoff authorizations typically permit revocation only during brief annual window periods, and the working of the revocation language may be difficult to understand.²⁴

In short, Bethlehem Steel and its fifty years of progeny should not be overruled, because permitting employers to stop deducting union dues when a contract expires protects employee Section 7 rights.

²¹ *WKYC-TV*, 359 NLRB No. 30 at 10 (Hayes, dissenting).

²² *Cf. Knox v. Service Employees Local 1000*, 132 S. Ct. 2277, 2290 (2012) (“...isn’t it likely that most employees who choose not to join the union that represents their bargaining unit prefer not to pay the full amount of union dues?”)

²³ *WKYC-TV*, *supra* at 10-11.

²⁴ *Id.* at 10.

CONCLUSION

For these reasons, the Administrative Law Judge's decision in Lincoln Lutheran of Racine should be affirmed.

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Dated: October 10, 2014

CERTIFICATE OF SERVICE

I certify that on October 10, 2014, I electronically filed the Brief of *Amicus Curiae* National Right to Work Legal Defense and Education Foundation, Inc., to the Executive Secretary of the National Labor Relations Board, and I emailed the same to the following:

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